

FEDERAL CIRCUIT COURT OF AUSTRALIA

*BGM16 v MINISTER FOR IMMIGRATION &
ANOR*

[2016] FCCA 2297

Catchwords:

MIGRATION – Administrative Appeals Tribunal (Migration and Refugees Division) – XA-866 (Permanent Protection) visa – whether the Tribunal misdirected itself at law – no jurisdictional error identified – application dismissed.

Legislation:

Acts Interpretation Act 1901 (Cth), ss.15AA, 15AB.

Migration Act 1958 (Cth), ss.4, 35A, 36, 91V, 91W, 91WA, 107A, 115.

Cases cited:

Dalla v Minister for Immigration and Border Protection [2016] FCA 998

Applicant:	BGM16
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 1312 of 2016
Judgment of:	Judge Street
Hearing date:	2 September 2016
Date of Last Submission:	2 September 2016
Delivered at:	Sydney
Delivered on:	2 September 2016

REPRESENTATION

Counsel for the Applicant:	Mr S Churches
Solicitors for the Applicant:	AXL Legal Solutions
Counsel for the Respondents:	Mr S Lloyd and Ms S Palaniappan
Solicitors for the Respondents:	Australian Government Solicitor

ORDERS

- (1) The amended application is dismissed.
- (2) The Applicant pay the costs of the First Respondent fixed in the amount of \$7,206.00.
- (3)
- (4)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 1312 of 2016

BGM16

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Background

1. This is an application for a Constitutional writ within the Court's jurisdiction, under s.476 of the *Migration Act 1958* (Cth) (**"the Act"**), in respect of a decision of the Administrative Appeals Tribunal (**"the Tribunal"**) made on 20 April 2016 holding that the grant of a protection visa was prevented by s. 91WA of the Act.
2. The applicant is Albanian and arrived in Australia from Greece, on a false passport containing an electronic visitor visa. Prior to the expiry of the visitor visa, the applicant applied for and was granted a TR-676 (Tourist) visa onshore, followed by a FA-600 (Tourist) visa onshore. On 13 June 2013, the Applicant applied for a TU-570 (Student) visa,

which was granted on 5 July 2013. The abovementioned visas were obtained by the applicant using the false Greek passport.

3. The applicant subsequently applied for a TU-572 (Student) visa, again using the false Greek passport. That application was refused on 11 June 2014. Thereafter, the applicant became an unlawful non-citizen in Australia. On 29 June 2015, the applicant was stopped by the New South Wales police and taken into immigration detention.
4. On 25 August 2015, the applicant applied for an XA-866 (Permanent Protection) visa. The application for protection was made using the applicant's real identity as an Albanian national.
5. On 19 October 2015, a delegate determined that the applicant was not a witness of truth and, therefore, was not satisfied that the applicant faced a real chance of persecution and declined to grant a protection visa.

The Tribunal's Decision

6. On 3 November 2015, the applicant applied to the Administrative Appeals Tribunal (**"the Tribunal"**) for review of the delegate's decision.
7. By letter dated 30 November 2015, the applicant was invited to attend a hearing to take place on 27 January 2016. The applicant attended on that date, to give evidence and present arguments. Following this hearing, a further hearing was scheduled for 29 March 2016, at which time the hearing resumed and the applicant gave further evidence and presented further submissions.
8. Prior to the resumed hearing, the applicant was notified by letter dated 15 March 2016, that the rescheduled hearing would consider s.91WA of the Act and its possible application to the applicant in the current case. The Tribunal noted that it intended to raise that the applicant had told the Department that he had entered Australia by providing a Greek passport in a different name and that the applicant had subsequently provided that passport in support of two student visa applications, two further visitor visa applications, and that the applicant had admitted that it was not his true identity.

9. In the Tribunal's reasons, the Tribunal identified the history of the applicant's application and what had occurred before the delegate. The Tribunal identified that it needed to consider the issue under s.91WA of the Act, an issue upon which the delegate had made no findings. The Tribunal identified what occurred prior to the adjourned hearing. At the hearing, the applicant confirmed that he understood the potential application of s.91WA of the Act to his matter.
10. The applicant acknowledged that he had purchased a Greek passport in a false name, whilst he was in Greece. The applicant agreed that the passport had a photograph of the applicant which was substituted for the original photo of the false person. The applicant acknowledged that included in the purchase of the Greek passport was an Australian electronic visa in the name of the false person. The applicant agreed that upon his arrival in Australia he had provided travel documents to border security. The applicant agreed that he applied for two further visitor visas and two student visas, on the basis of that Greek passport over the subsequent two years. The applicant also agreed that he provided a driver's licence, in a different name, to the police.
11. The applicant claims that the identity on the Albanian National Identity Card provided is his true identity. The Tribunal found that the Greek passport was a bogus document because the Tribunal reasonably suspects that it purports to have been, but was not, issued in respect of the applicant. Further, the Tribunal reasonably suspected that the Greek passport was fraudulently altered.
12. The Tribunal turned to the question of the application of s.91WA of the Act in respect of the applicant in the present case. The Tribunal took into account the other provisions in Division 3 of Part 2 and, in particular, the language used in s.91WA, as opposed to the language used in ss.91V and 91W. The Tribunal found that the Greek passport was a bogus document and that the applicant had provided the bogus document as evidence of his identity, nationality, and citizenship.
13. The Tribunal then turned to the consideration of whether there was a reasonable explanation, within s.91WA of the Act, for providing that bogus document and whether the applicant has provided evidence of his identity. The applicant's explanation for providing the bogus document was to enable him to enter Australia in order to seek

protection. The applicant explained that he used the bogus document initially out of fear for his safety and, subsequently, because it was the only form of identification.

14. The Tribunal did not find the explanation for providing the bogus passport at the border was reasonable. The Tribunal noted that the applicant had evidence of his actual identity, being the national identity card, and, in those circumstances, found the applicant's explanation for providing the bogus passport to the Immigration Department, whilst applying for onshore visas, was not reasonable. It was in these circumstances that the Tribunal found that s.91WA(1) applied to the applicant and that the grant of the visa was prevented by s.91WA of the Act.

Proceedings Before This Court

15. The ground of the amended application is as follows:

*The Tribunal misdirected itself at law by determining that s91WA of the **Migration Act 1958** applied to the application, first made by the Applicant on 25 August 2015, for a protection visa.*

Particulars

(A) At [48] of the Decision of the AAT, the Tribunal determined to give the broadest scope to s91WA, so that it was read as applying to bogus documents utilised by the Applicant to enter Australia, but which bogus documents were not used in the Application for a protection visa.

16. (emphasis in original)

17. The amended application included a Ground 1(B), which counsel for the applicant, Mr Churches, confirmed was not pressed.
18. Section 91WA was introduced into the Act by Part 2 of Schedule 1 of the *Migration Amendment (Protection and Other Measures) Act 2015*. Section 91WA provides as follows:

Providing bogus documents or destroying identity documents

(1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:

(a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or

(b) the Minister is satisfied that the applicant:

(i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or

(ii) has caused such documentary evidence to be destroyed or disposed of.

(2) Subsection (1) does not apply if the Minister is satisfied that the applicant:

(a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and

(b) either:

(i) provides documentary evidence of his or her identity, nationality or citizenship; or

(ii) has taken reasonable steps to provide such evidence.

(3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

19. Sections 91V and 91W of the Act are also provisions that were introduced by that amendment into subdivision AL of the Act, “Other provisions about protection visas”. Those provisions are as follows:

Section 91V - Verification of information

Applicant for protection visa

(1) If an applicant for a protection visa has given information to the Minister or an officer in, or in connection with, the application for the visa, the Minister or an officer may, either orally or in writing, request the applicant to make an oral statement, on oath or affirmation, to the effect that the information is true.

(2) If:

(a) the applicant has been given a request under subsection (1); and

(b) the applicant refuses or fails to comply with the request; and

(c) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister may draw an inference unfavourable to the applicant's credibility in the event that the applicant refuses or fails to comply with the request;

then, in making a decision whether to grant the protection visa to the applicant, the Minister may draw any reasonable inference unfavourable to the applicant's credibility.

(3) If:

(a) the applicant has been given a request under subsection (1); and

(b) the applicant complies with the request; and

(c) the Minister has reason to believe that, because of:

(i) the manner in which the applicant complied with the request; or

(ii) the applicant's demeanour in relation to compliance with the request;

the applicant was not sincere;

then, in making a decision whether to grant the protection visa to the applicant, the Minister may draw any reasonable inference unfavourable to the applicant's credibility.

Non-citizen refused immigration clearance

(4) If:

(a) either:

(i) a non-citizen gave information to an officer when the non-citizen was in immigration clearance, and the non-citizen is subsequently refused immigration clearance; or

(ii) a non-citizen was refused immigration clearance and subsequently gave information to an officer; and

(b) the information is relevant to the administration or enforcement of this Act or the regulations;

an officer may, either orally or in writing, request the non-citizen to make an oral statement, on oath or affirmation, to the effect that the information is true.

(5) If:

(a) the non-citizen has been given a request under subsection (4); and

(b) the non-citizen refuses or fails to comply with the request; and

(c) when the request was made, the non-citizen was given a warning, either orally or in writing, that the Minister may draw an inference unfavourable to the non-citizen's credibility in the event that the non-citizen refuses or fails to comply with the request;

then, in making a decision about the non-citizen under this Act or the regulations, the Minister may draw any reasonable inference unfavourable to the non-citizen's credibility.

(6) If:

(a) the non-citizen has been given a request under subsection (4); and

(b) the non-citizen complies with the request; and

(c) the Minister has reason to believe that, because of:

(i) the manner in which the non-citizen complied with the request; or

(ii) the non-citizen's demeanour in relation to compliance with the request;

the non-citizen was not sincere;

then, in making a decision about the non-citizen under this Act or the regulations, the Minister may draw any reasonable inference unfavourable to the non-citizen's credibility.

Officer

(7) A reference in this section to an officer includes a reference to a person who is a clearance officer within the meaning of section 165.

Oaths or affirmations

(8) The Minister or an officer may administer an oath or affirmation for the purposes of this section.

Section 91W - Evidence of identity and bogus documents

(1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.

(2) The Minister must refuse to grant the protection visa to the applicant if:

(a) the applicant has been given a request under subsection (1); and

(b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and

(c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and

(d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:

(i) refuses or fails to comply with the request;
or

(ii) produces a bogus document in response to the request.

(3) Subsection (2) does not apply if the Minister is satisfied that the applicant:

(a) has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document; and

(b) either:

(i) produces documentary evidence of his or her identity, nationality or citizenship; or

(ii) has taken reasonable steps to produce such evidence.

(4) For the purposes of this section, a person produces a document if the person produces, gives, presents or provides the document or causes the document to be produced, given, presented or provided.

20. The transitional provisions in schedule 1, part 3, para.15(3) provide as follows:

Sections 91W, 91WA and 91WB of the Migration Act 1958 as amended by Part 2 of this Schedule apply to an application for a protection visa:

(a) *Made on or after the commencement of that Part; or*

(b) *Made before the commencement of that Part but not finally determined as at the commencement of that Part.*

21. The object of the Migration Act, as identified in s.4, is as follows:

Object of Act

(1) *The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.*

(2) *To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain.*

(3) *To advance its object, this Act provides for non-citizens and citizens to be required to provide personal identifiers for the purposes of this Act or the regulations.*

(4) *To advance its object, this Act provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act.*

(5) To advance its object, this Act provides for the taking of unauthorised maritime arrivals from Australia to a regional processing country.

22. Section 35A of the Act identifies the class of protection visas that might be granted and s.36 of the Act identifies the criteria that must be met in respect of a protection visa. Those provisions are within Division 3 of Subdivision A of Part 2. The Court was also taken to Subdivision C, entitled, “Visas based on incorrect information may be cancelled”.
23. Mr Churches, on behalf of the applicant, submitted that s.91WA(1)(a) of the Act should be construed as having application only to a bogus document provided when applying for a protection visa, or in the alternative, as only having application in respect of an applicant who provides the bogus document in the application for protection.
24. The Court’s attention was drawn to the language in s.91WA(1)(a) and present tense, “*Provides*”, as well as reference to the past tense in s.91WA(1)(b). Section 91W is a provision in terms of a request for information. The context of the provisions, including s.91V, does not, in my opinion, support a reading down of the clear words in s.91WA(1). Section 91V is an example of use of express words of confinement in, or in connection with, the application for a visa. There is no warrant for reading in an implication of those words into s.91WA or words of the kind raised by Mr Churches, “*When applying for a protection visa or, alternatively, in the application for a protection visa*”.
25. Applications for a protection visa, under the Act, may arise as a result of persons lawfully arriving in Australia, as well as unlawfully arising in Australia. The object of the Act is to regulate and protect Australian citizens in relation to people arriving in Australia.
26. The Court was taken to the second reading material and, in particular, the explanatory memorandum for the Migration Amendment (Protection and Other Measures) Bill 2014, at page 2:

Specifically, the Bill amends the Migration Act to:

- *make clear that it is an asylum seeker’s responsibility to specify the particulars of their claim to be a person in respect of whom*

Australia has protection obligations and to provide sufficient evidence to establish their claim;

- *provide for the Refugee Review Tribunal (RRT) to draw an unfavourable inference with regard to the credibility of claims or evidence that are raised by a protection visa applicant at the review stage for the first time, if the applicant has no reasonable explanation to justify why those claims and evidence were not raised before a primary decision was made;*

- *create grounds to refuse a protection visa application when an applicant refuses or fails to establish their identity, nationality or citizenship, and does not have a reasonable explanation for doing so, including when an applicant provides bogus documents to establish their identity or either destroys or discards such evidence, or has caused that evidence to be destroyed or discarded;*

- *clarify when an applicant who applies for a protection visa, where a criterion for the grant of a visa is that they are a member of the same family unit of a person who engages Australia's protection obligations, is to make their application for a protection visa;*

- *define the risk threshold for assessing Australia's protection obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);*

- *simplify the legal framework relating to unauthorised maritime arrivals and transitory persons who can make a valid application for a visa;*

- *increase processing and administrative efficiency of the Migration Review Tribunal (MRT) and the RRT, including:*

- o strengthening the powers of the Principal Member to issue guidance decisions and practice directions;*

- o enabling the Tribunals to make an oral statement of reasons where there is an oral decision without the need for a written statement of reasons; and*

- o introducing a power to dismiss an application where an applicant fails to appear before the Tribunal after being invited to do so, with an ability to reinstate the application*

where the applicant applies for reinstatement within a specified period of time; and

- make a technical amendment to put beyond doubt when a review of a decision that has been made in respect of an application under the Migration Act is 'finally determined'.*

27. The Court was also taken to paras.55 and 57 of the memorandum, as follows:

55. The purpose of new section 91WA is to encourage an applicant to comply and assist with authenticating their identity, nationality or citizenship by providing a reasonable explanation for providing a bogus document or for the destruction or disposal of the documentary evidence and either providing documentary evidence of their identity, nationality or citizenship or having taken reasonable steps to provide evidence. It would not be acceptable for the applicant to produce any document as documentary evidence of their identity, nationality or citizenship that is a bogus document.

57. The purpose of this amendment is to ensure a protection visa applicant provides documentary evidence of their identity, nationality or citizenship wherever possible to do so and to discourage applicants from providing false identity documents, or destroying or discarding existing, genuine documents.

28. Mr Churches, Counsel for the applicant, contended that the explanatory memorandum assisted in a construction that the purpose of s.91WA of the Act was confined to a bogus document, in respect of the application for a protection visa. In my opinion, the words of s.91WA have no ambiguity in respect of which the explanatory memorandum assists.
29. Mr Churches also submitted that the provision was one to which the legality principle should be applied, see Logan J in *Dalla v Minister for Immigration and Border Protection* [2016] FCA 998 at [26]. I do not accept that the legislative provision in the present case has scope for application of that principle as the statutory words are clear and should not be read down.
30. Mr Churches argued that the context, purpose, intention, and object supported a construction limiting s.91WA(1) of the Act to a bogus document provided when applying for protection. It was submitted that in the present case, the applicant provided his true identity information

to the Tribunal at the time of his application for protection. If the words in s.91WA of the Act were to be read as having a meaning similar to that in s.91V, “*in or in connection with*”, the applicant’s evidence identifies his intention to obtain protection in Australia at the time of providing the bogus document. Accordingly s.91WA were to be so read it would not assist the applicant in the present case.

31. The Court was taken to the *Acts Interpretation Act 1901* (Cth) provisions, in particular ss.15AB and 15AA. I do not accept that the object of s.91WA of the Act was intended to be confined to the provision of bogus documents, in connection or in respect of the application for a protection visa being determined at that time.
32. The Court was also referred to s.107A of the Act, which is an example of language that might have been used in s.91WA of the Act. The provisions of subdivision C have application, as identified in s.115 of the Act. It was common ground that subdivision C can apply to a protection visa. The work done by subdivision C is, however, focused upon incorrect information ascertained after the grant of a visa. I do not regard the language in subdivision C as supporting any uncertainty in relation to the construction of s.91WA of the Act.
33. I have taken into account that the principle that proper construction is to be found in the meaning of the statutory language, read in its statutory context and in light of its statutory purpose.
34. Applicants for a protection visa may have arrived in Australia years earlier, as a result of genuine or bogus documents. A person who is an unlawful arrival, may also provide a bogus document. On the ordinary meaning of the provision, it has application to a bogus document that has been provided as evidence of the applicant’s identity, nationality or citizenship. There is no warrant for reading in a temporal limitation into the provision. Further, the object of the Act does not support any such temporal limitation.
35. Section 91WA(2) of the Act, and the use of the term “providing”, supports the construction adopted by the Court. Section 91WA(2) of the Act and the use of the term “providing”, in respect of the subject matter of both subsections (1)(a) and (1)(b), means no significance should be given to the use of the present tense or past tense in the

construction of the provision. Section 91WA of the Act should be read as a whole.

36. For these reasons, in my opinion, the Tribunal was correct in its application of s.91WA of the Act to the present case. The alleged jurisdictional error in ground 1(A) is not made out.
37. The amended application is dismissed.

I certify that the preceding thirty-six (36) paragraphs are a true copy of the reasons for judgment of Judge Street

Date: 6 October 2016